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No. 88-42

In The  
**Supreme Court of the United States**  
October Term, 1988

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OLAF A. HALLSTROM and MARY E. HALLSTROM,  
*Petitioners,*  
v.

TILLAMOOK COUNTY, a municipal corporation,  
*Respondent.*

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On Writ Of Certiorari To The United States Court Of  
Appeals For The Ninth Circuit

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**PETITIONERS' REPLY BRIEF**

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PETITIONERS' REPLY BRIEF

## ARGUMENT

1. The Hallstroms agree that notice is a requirement, but do not agree that notice is a jurisdictional requirement that can never be subject to cure, waiver, estoppel, or equitable modification.

There is no issue that the citizen suit provisions of the Resource Conservation and Recovery Act, § 7002 (a) and (b), 90 Stat. 2825, 42 U.S.C. § 6972(a) and (b) (1982 ed. & Supp. III) ("RCRA") require notice before commencement of a citizen suit. The question presented is whether

lack of notice to the government before commencement requires dismissal and immediate refiling.

The question is not answered by the text of the statute because the statute does not describe notice as a jurisdictional requirement nor does it require dismissal and refiling.

Furthermore, interpreting notice as a jurisdictional requirement would lead, in this case and in other cases, to a futile result plainly at variance with (1) the purpose and policy of the statute as a whole and (2) this Court's decisions on similar prelitigation requirements. E.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (stay during prelitigation waiting period preferable to dismissal with leave to refile); *Newman-Green, Inc. v. Alfonzo-Larrain*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2218 (June 12, 1989) (jumping through "judicial hoops" of dismissal and refiling is not required because appellate court has power to dismiss dispensable nondiverse party).

2. Tillamook County and the Solicitor General have ignored the factual context of this case because it shows why a jurisdictional interpretation would defeat the purpose of the statute as a whole.

In presenting their argument that notice is a requirement, therefore it must be a *jurisdictional* requirement,<sup>1</sup> Tillamook County and the Solicitor General ignore several concrete facts.

<sup>1</sup> It is ironic that Tillamook County and the Solicitor General ask this Court to impose a bright line jurisdictional inter-

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First, the Hallstroms acted as private attorneys general with no hope of recovering damages under the Act. They took the case to trial, spent \$95,000, and eventually, after years of litigation, obtained an injunction against Tillamook County for the protection of the environment. Under similar circumstances, this Court unanimously rejected the request of a civil rights violator to interpret a statutory attorney fee provision against a private attorney general. The Court based its decision in part on the important role that a private attorney general plays in protecting the interests of the Nation:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered the highest priority.

*Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-02 (1967) (case brought to enforce Title II of the Civil Rights Act of 1964, § 204(a), 78 Stat. 244, 42 U.S.C. § 2000a-3(a)) (citations and footnotes omitted).

Second, the Hallstroms justifiably relied on the district court's decision that they had cured any defect by

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pretation of the 60 day notice requirement when Tillamook County and the Solicitor General failed to comply with the 15 day time requirement of Supreme Court Rule 38.4 when they moved for leave for the Solicitor General to present oral argument.

formally notifying the Environmental Protection Agency ("EPA") and the Oregon Department of Environmental Quality ("DEQ") after the case was filed. J.A. 57. The Hallstroms could have dismissed the case and refiled it nine days after the district court's decision. They did not do so because the district court led them to believe that they had done everything required of them. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (in Title VII case, equitable tolling of statutory prelitigation requirement might be appropriate "where court has led the plaintiff to believe that she had done everything required of her").

Third, Tillamook County did not voluntarily comply with the Act even though it had been given formal written notice of the violation nearly a year before the case was filed. Tillamook County has not suggested that it was in any way prejudiced by the lack of notice to DEQ and EPA, nor has Tillamook County shown any way that its conduct would have differed if notice had been given.

Fourth, DEQ had actual notice that Tillamook County was in violation of RCRA for at least a year and a half before the Hallstroms filed this citizen's suit so further notice would have served no purpose.<sup>2</sup>

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<sup>2</sup> In its brief, Tillamook County urges this Court not to consider the fact that DEQ had actual notice of the violation before the citizen's suit was filed because it was not argued below. Resp. Br. at 3, n. 1. This Court should not close its eyes to DEQ's actual notice for several reasons. First, DEQ's actual notice of the violation is a fact, not an argument or a new issue. Second, it is a fact that is fairly comprised within the issue

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Fifth, DEQ and EPA did not begin an administrative action nor issue any administrative order after receiving notice of the violation and of the pending citizen's suit.<sup>3</sup>

Sixth, DEQ and EPA did not file any enforcement action in court after receiving notice of the violation or notice that the citizen's suit had been filed. See § 7002(b)(2), 42 U.S.C. § 6972(b)(2) (the citizen's suit may not be commenced if the EPA or the state has commenced and is diligently prosecuting an enforcement action in federal or state court).

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presented by the petition for certiorari. E.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Third, *Price Waterhouse v. Hopkins*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1775, 1785, n. 5 (1989) does not support Tillamook County's position. The question presented there concerned the respective burdens of proof of the parties in a Title VII suit. This Court declined to consider an unrelated and newly raised issue whether the employer had subjected the employee "to a biased decisionmaking process that 'tended to deprive a woman of a partnership on the basis of her sex.'" *Id.* That issue was not fairly comprised within the issue of burden of proof presented in the petition for certiorari. In contrast, DEQ's actual notice of the violation, and its subsequent inaction, bears on whether the notice requirement is subject to cure or equitable modification under appropriate circumstances because DEQ's actual notice is a circumstance that should be considered.

<sup>3</sup> Under RCRA, only DEQ, not the EPA, has authority to initiate an administrative proceeding to enforce compliance with the Solid Waste Subchapter, §§ 4001-4009, 42 U.S.C. §§ 6941-6949. In his brief, the Solicitor General erroneously argues that EPA has this administrative authority. Amicus Br. at 1, n. 1. The part of RCRA that the Solicitor General relies on, however, refers only to violations of the Hazardous Waste Subchapter, §§ 3001-3013, 42 U.S.C. §§ 6921-6934.

Seventh, neither DEQ nor EPA sought to intervene even though they had a right to do so. Section 7002(b), 42 U.S.C. § 6972(b), as amended in 1984, provides in pertinent part, "In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right." Similarly, § 7002(d), 42 U.S.C. § 6972(d), provides, "In any action under this section, the Administrator, if not a party, may intervene as a matter of right."

Finally, the case went to trial in July 1985, two years after formal notice. At no time, either before or after trial, has DEQ or EPA voiced any objection to being notified after the citizen's suit was filed instead of before.

**3. The text of the statute does not resolve the question whether lack of notice to the government requires dismissal and refiling.**

The text of the statute provides that notice is a requirement, but it does not say that lack of notice to the government, when notice was given to the violator, requires dismissal and refiling. The provision of the statute that grants jurisdiction to the district courts does not limit jurisdiction to cases where notice was given. Congress could have chosen to make notice a jurisdictional requirement, but it did not do so. This Court should decline the invitation of Tillamook County, an adjudicated violator of RCRA, to amend the citizen's suit provisions to make notice a jurisdictional, rather than a procedural, requirement.

This principle was applied in *Finley v. U.S.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2003 (1989), Justice Scalia observed that the

text of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), did not confer jurisdiction over "pendent party" claims:

The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States" – formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

*Id.* at 2008.

The Solicitor General argues that the word "jurisdictional" is not necessary and cites *Teague v. Regional Comm'r of Customs, Region II*, 394 U.S. 977 (1969). *Teague*, however, is not an opinion of this Court. Rather, it is an opinion written by Justice Black and joined by Justice Douglas in dissent to a decision to deny certiorari.

In support of its argument that this Court must interpret the notice requirement as jurisdictional, Tillamook County cites *Torres v. Oakland Scavenger Co.*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 2405 (1988), in which this Court held that a federal appellate court does not have jurisdiction over a party who is not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c). Tillamook County neglected to mention, however, that this Court relied for its conclusion on the views of the Advisory Committee that "the timely filing of a notice of appeal is 'mandatory and jurisdictional'. . . ." *Id.* at 2408.

**4. Although notice is required, dismissal and refiling are not. A stay is all that is needed.**

A jurisdictional interpretation in this case would require a futile result, *i.e.*, dismissal and immediate refiling. When confronted with the same question in a different contexts, this Court has held that the futile act of dismissal and refiling is not necessary, and that a stay would be sufficient.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court was asked to decide whether (1) the Age Discrimination in Employment Act of 1967, 81 Stat. 607, 29 U.S.C. § 633, required the claimant to resort first to state agencies before bringing an enforcement action in federal court, and (2) if so, what were the consequences of a failure to do so. The Court first held that resort to state agencies was indeed a "mandatory" requirement. The Court then held that the federal court action should be stayed, rather than dismissed with leave to refile, while the claimant filed a complaint with the state agencies:

We therefore hold that respondent may yet comply with the requirements of § 14b by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile, the federal suit should be held in abeyance.

*Id.* at 765. In a footnote, this Court specifically addressed the question whether a stay, rather than dismissal, is preferable:

Suspension of proceedings is preferable to dismissal with leave to refile. Respondent's timely complaint has already satisfied the requirements of 29 U.S.C. § 626(e), "to require a second 'filing' by the

aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." For this reason, suspension pending deferral is the preferred practice in the federal courts.

*Id.* at 766 n. 13 (citations omitted).

This Court most recently held that a dismissal and refiling would not be required in the context of diversity jurisdiction. In *Newman-Green, Inc. v. Alfonzo-Larrain*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2218 (June 12, 1989), the Court held that a court of appeals has the authority to grant a motion to dismiss a dispensable nondiverse party:

We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. . . . If the entire suit were dismissed, Newman-Green would simply refile in the District Court against the Venezuelan corporation and the four Venezuelans and submit the discovery material already in hand. The case would then proceed to a preordained judgment. Newman-Green should not be compelled to jump through these judicial hoops merely for the sake of jurisdictional purity.

*Id.* at 2225.

*Oscar Mayer* and *Newman-Green* are in accord with the long standing principle that equity does not compel a useless or futile formality. *E.g.*, *Merchants Nat. Bank v. H.L.C. Enterprises*, 441 N.E.2d 509, 514 (Ind. App. 1982) (special notice of default to the guarantor of a corporation's debt was not required when the guarantor was one

of two officers and shareholders of the corporation because "[e]quity should not and will not require the performance of a useless formality."; *Carpenter v. Riley*, 675 P.2d 900, 904 (Kan. 1984) (after plaintiffs' refusal to accept defendant's tender in 1981, defendant was no longer required to tender future installment payments into court because tender would serve no purpose, tender would be a mere formality, and equity does not insist on purposeless conduct and disregards mere formality).

Tillamook County's attempt to distinguish *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) misses the point. First, the requirement in *Zipes* was prelitigation requirement, just as notice is a prelitigation requirement. Second, this case went to trial and has been in litigation for years, so more is at stake than delay for 60 days. Third, the 60 day waiting period is just enough time for the government to decide whether to file an enforcement action; it is not enough time to seek nonjudicial resolution. Nothing in the statute or the legislative history suggests a purpose of nonjudicial resolution. Fourth, the principle that dismissal and refiling is excessively formalistic applies to this case just as it did in *Zipes*, *Oscar Mayer*, and *Newman-Green*.

Similarly, the Solicitor General misstates, rather than discusses, the principle applied in *Zipes*. The Hallstroms did not argue, and this Court did not say in *Zipes*, that the district court has unfettered discretion to disregard the filing requirements of Title VII. The Hallstroms did argue, and this Court did say, that the time limit for filing charges with the Equal Employment Opportunity Commission was not a jurisdictional requirement, and therefore, it was subject to waiver, estoppel, and equitable

modification. *Zipes* was reaffirmed in *Lorance v. AT&T Technologies, Inc.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2261, 2268 (June 12, 1989) (limitations period for Title VII action based on facially neutral seniority system begins to run from adoption of the system, not when impact of system is felt by individual).

**5. The question presented is resolved by interpretation of the statute, which is a proper function of this Court.**

When the text of the statute does not answer the question, or when a literal application of the naked text would produce an "odd result," *Green v. Bock Laundry Machine Co.*, 490 U.S. \_\_\_, 109 S. Ct. 1981, 1984 (1989), or "'patently absurd consequences' that 'Congress could not possibly have intended,'" *Public Citizen v. Department of Justice*, \_\_\_ U.S. \_\_\_, 109 S. Ct. \_\_\_ (1989) (Kennedy, J. concurring), or "an unreasonable [result] 'plainly at variance with the policy of the legislation as a whole,'" *U.S. v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543 (1940), it is appropriate to look to evidence of Congressional intent and purpose. Here, the legislative history does not address the question whether the notice requirement is a *per se* rule that is always to be applied regardless of the circumstances. However, the legislative history does place the notice requirement in the context of the purpose of the statute as a whole. It does say that once the government has had time to decide whether to act, a citizen's suit is proper. That is exactly what happened here.

The Hallstroms do not ask this Court to rewrite RCRA. The Hallstroms do not ask this Court to say that notice is not a requirement. Instead, the Hallstroms ask this Court to interpret the notice provision to avoid futile, absurd, and unreasonable results plainly at variance with the purpose and policy of the statute as a whole.

As noted in the opening brief, a jurisdictional interpretation will lead to absurd or unreasonable results plainly at variance with the purpose and policy of the statute as a whole. Additional examples of absurd results that were avoided by an interpretation that did not require dismissal and refiling are found in *Student Public Interest v. AT&T Bell Lab.*, 617 F. Supp. 1190 (D. N.J. 1985) and *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D. R.I. 1977).

In *Student Public Interest*, two environmental groups brought an action against AT&T Bell Laboratories for violation of the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365. One of the environmental groups, but not the other, gave notice to the defendant. The defendant moved to preclude the environmental group that had not given notice from participating in the suit. The district court denied the motion and held that the failure of one environmental group to give notice did not deprive the district court of subject matter jurisdiction.

In *Save Our Sound*, a citizen group brought an action against the Army Corps of Engineers under the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365, and the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415(g)(1) to enjoin the

dumping of dredged material at a specific location. The court observed that the plaintiff had a long-standing concern and had notified the Corps of that concern well in advance of filing the citizen's suit. Thereafter, apparently to sidestep the plaintiff's challenge to the project, the Corps took illegal shortcuts for awarding the dredging contract. Upon learning that the project was about to begin, plaintiff filed a formal notice and then commenced its citizen's suit six days later. The district court observed that the plaintiff would have had time to comply with the 60 day waiting period if the Corps had complied with statutory requirements:

Under the government's view of the case, although plaintiff would have been able to comply with the requisite notice precedent to filing a citizen's suit had the Corps complied with NEPA, FWPCA, and MPRSA, the Corps' violation of these three important statutes effectively removed plaintiff's opportunity to maintain a citizen's suit under the Acts, until the damage sought to be avoided would have been largely accomplished. This Court cannot sanction such a transparent attempt to undermine Congressional policies and intention.

*Id.* at 1144. Accordingly, the district court held that, "in the narrow circumstances here presented," plaintiff's expression of interest in the dredging project constructively satisfied the 60 day notice requirement. Although *Save Our Sound* does not speak in terms of equitable modification, that is exactly what happened. This is particularly noteworthy because the district court in that case had obviously struggled with the impossibility of reconciling a jurisdictional interpretation to Congress' intention.

This Court has the authority to say what the law is, *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and it has authority to look behind the words of the statute to the purpose the words were written to accomplish. The purpose of statutory interpretation is to accomplish the objective of Congress. On occasion, an interpretation contrary to a superficial, unflective, or wooden reading of the statute is necessary to accomplish the objective of Congress. To adhere to an interpretation that would lead to an absurd result or a result plainly at variance with the purpose and policy of the statute as a whole would be to enter the realm of legislation. The Court enters the realm of legislation when it interprets a statute in a way that defeats the accomplishment of Congress's purpose.

This Court most recently spoke on the process of statutory interpretation in *Public Citizen v. Department of Justice*, \_\_\_ U.S. \_\_\_, 109 S. Ct. \_\_\_ (1989):

Even though, as Judge Learned Hand said, "The words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (CA 2), aff'd, 326 U.S. 404 (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive

evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

As Justice Kennedy noted in his concurring opinion to *Public Citizen*, the process of statutory interpretation, even an interpretation that departs from the literal words of the statute, is appropriate when a literal interpretation would lead to absurd consequences:

When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the co-equal Legislative Branch, which we assume would not act in an absurd way.

109 S. Ct. at \_\_\_.

**6. The 1984 Amendments to RCRA do not resolve the question whether lack of notice to the government requires dismissal and refiling.**

In 1984, Congress amended the citizen's suit provision of RCRA in three important aspects. First, Congress extended the reach of citizen's suits to practices that "may present an imminent and substantial endangerment to health or the environment." Section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). Before this amendment, only the EPA could bring such an enforcement action. Section 7003(a), 42 U.S.C. § 6973(a). Second, Congress provided for intervention in a citizen's suit to compel compliance with RCRA by "any person" "as a matter of right." Section 7002(b), 42 U.S.C. § 6972(b). These two amendments demonstrate Congress' confidence in citizen enforcement.

The third amendment provided that notice, but not the 60 day waiting period, is required when a hazardous

waste violation is alleged. The amendment to § 7002(b), 42 U.S.C. § 6972(b), provides:

except that such action [to compel compliance with RCRA] may be brought *immediately after such notification* [of the violation to the Administrator, the State, and to any alleged violator] in the case of an action under this section respecting a violation of subchapter III [Hazardous Waste Management] of this chapter; . . .

Thus, the 1984 amendments do not eliminate notice as a prelitigation requirement in a citizen's suit brought to eliminate a hazardous waste violation. The question whether lack of notice to the government (when notice was given to the violator) would require dismissal and refiling still remains.

For example, what would happen if a hazardous waste citizen's suit were commenced immediately before notice were given to the EPA, DEQ, and the alleged violator? Under a jurisdictional interpretation, the case would have to be dismissed and refiled. Similarly, what would happen if a hazardous waste citizen's suit were filed without giving notice to the EPA and DEQ when those agencies already had actual notice of the hazardous waste violation and had previously indicated to the citizen that they did not have the time or money to bring an enforcement action of their own? Under a jurisdictional interpretation, the case would have to be dismissed and refiled even if the violator had been given notice.

Incidentally, when the 1984 amendments were enacted, of the five circuits that had addressed the question presented in this case, only one had held that notice was a jurisdictional requirement. *Garcia v. Cecos Intern.,*

*Inc.*, 761 F.2d 76 (1st Cir. 1985) and *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the cases the Ninth Circuit mainly relied on, had not yet been decided. The legislative history to the 1984 amendments shows that the House Committee was aware of case law in the area, and specifically discussed the misinterpretation of § 4005(a), 42 U.S.C. § 6945(a) by a federal district court in Texas, *City of Gallatin v. Cherokee County*, 563 F. Supp. 940 (E.D. Tex. 1983). H. Rep. 98-198, Part I, 98 Cong., reprinted in [1984] U.S. Code. Cong. & Ad. News 5612-13. The House Committee did not discuss whether the Second, Third, Eighth, and District of Columbia Circuits were correct in interpreting the notice provision as not requiring dismissal, or whether the Seventh Circuit was correct in interpreting the notice requirement as jurisdictional.<sup>4</sup>

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## CONCLUSION

The text of the statute does not compel an interpretation that notice is a jurisdictional requirement. Even if it

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<sup>4</sup> *Natural Resources Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975) (dismissal not required); *Susquehanna Valley Alliance v. Three-Mile Island*, 619 F.2d 231, 243 (3d Cir. 1980) (dismissal and refiling not required), *cert. denied*, 449 U.S. 1096 (1981); *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983) (dismissal not required because purpose of notice satisfied); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (1976) (dismissal and refiling not required); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974) (not jurisdictional); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975) (jurisdictional), *cert. denied*, 424 U.S. 927 (1976).

did, this Court has the constitutional authority to look beyond the text of the statute when the literal reading would compel an odd, absurd, or unreasonable result plainly at variance with the purpose of the statute as a whole. The legislative history says that once the government has had time to decide whether to bring an enforcement action in court of its own, a citizen's suit is proper. This is exactly what happened here. To remand a case back for dismissal and refiling would be compelling the Hallstroms to jump through hoops for no purpose. An interpretation, similar to that given to prelitigation requirements in *Zipes* and *Oscar Mayer*, that the notice requirement is subject to cure, waiver, estoppel, or equitable modification is consistent with the text of the notice provision and the purpose of the statute as a whole.

Accordingly, the Hallstroms respectfully request this Court to reverse the decision of the Ninth Circuit and remand the case to the circuit court for consideration of the other issues raised on appeal.

Respectfully submitted,

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